

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BofI FEDERAL BANK, a federal savings bank,

Plaintiff,

v.

CHARLES MATTHEW ERHART, an individual; and DOES 1-25, inclusive,

Defendant.

Case No.: 15cv2353 BAS (NLS)

ORDER DETERMINING JOINT MOTION FOR DISCOVERY DISPUTE NO. 2 AND DENYING PLAINTIFF’S MOTION FOR CONTEMPT

[Dkt. No. 50]

Plaintiff BofI Federal Bank (BofI) filed an action against its former employee, defendant Charles Matthew Erhart, for federal computer fraud and various state claims based on his alleged theft and dissemination of BofI’s confidential, privileged and proprietary information.¹ BofI and third party Carol Gillam—counsel of record for Erhart—filed a joint discovery motion in April 2016 to determine the propriety of discovery requests sent to Ms. Gillam through a Rule 45 subpoena. The court issued an order on April 26, 2016 compelling Ms. Gillam to produce all non-privileged, responsive documents, and to produce a privilege log.

¹ This action came on the heels of Erhart filing a whistleblower action against BofI based on retaliation, wrongful termination and other claims. *See Erhart v. BofI*, Case No. 15cv2287 BAS (NLS).

1 Now BofI complains that Ms. Gillam is in contempt of that order because she is
2 withholding documents protected by a purported law enforcement privilege and on other
3 grounds. For the following reasons, the court **DENIES** BofI's motion for contempt.

4 **I. RELEVANT BACKGROUND**

5 In Joint Discovery Motion No. 1, BofI sought documents showing Ms. Gillam's
6 own communications with third parties concerning BofI.² While the subpoena sought all
7 communications with third parties, the briefing focused on only Ms. Gillam's
8 communications with the media, and did not mention her communications with law
9 enforcement agencies. This court found the documents relevant and overruled Ms.
10 Gillam's objections as to vagueness, ambiguity, breadth, undue burden and procedural
11 defect, and ordered her to produce them by May 10, 2016. But it allowed Ms. Gillam to
12 produce a privilege log for any documents over which she claimed work product
13 protection. *See* Apr. 26 Order, pp. 6-8.

14 BofI reviewed Ms. Gillam's May 10 production and believed it was incomplete.
15 The parties were ultimately able to meet and confer on June 21, 2016 and resolved most
16 issues. Also, albeit late, Ms. Gillam provided a privilege log to BofI. The primary issue
17 here is whether Ms. Gillam's communications with law enforcement agencies are
18 privileged.

19 **II. LEGAL STANDARD**

20 Ms. Gillam asserts that the relevant legal standard is discoverability under Rule
21 26(b) and Rule 45(d). But that standard was relevant for the original discovery order, and
22 not for this motion for contempt.

23
24
25 ² The subpoena specifically sought Gillam's communications regarding BofI with (1) The
26 New York Times; (2) Peter Eavis, a writer for The New York Times; (3) Seeking Alpha,
27 Inc., an investment blog; (4) people that write articles for submission to Seeking Alpha;
28 (5) people seeking or sharing information on BofI, such as brokerage firms, short sellers,
investors, law firms, investigators and others; and (6) any person during the time period
September 23, 2013 to the present. Jt. Mtn. No. 1, Ex. D.

1 In a contempt proceeding, “The court... may hold in contempt a person who,
2 having been served, fails without adequate excuse to obey the subpoena or an order
3 related to it.” Fed. R. Civ. P. 45(g). “The party moving for contempt has the burden to
4 establish by clear and convincing evidence that the contemnor has violated a clear and
5 specific court order.” *Forsythe v. Brown*, 281 F.R.D. 577, 587 (D. Nev. 2012) (citation
6 omitted). Once the moving party meets its clear and convincing evidence burden, the
7 burden shifts to the contemnor to show that “she took every reasonable step to comply
8 and to explain why compliance was not possible.” *Id.* To assess whether every
9 reasonable step has been taken, courts can consider “(1) a history of noncompliance and
10 (2) failure to comply despite the pendency of a contempt motion.” *Id.* (internal citation
11 and quotations omitted).

12 **III. DISCUSSION**

13 **A. Law Enforcement Privilege.**

14 In her initial response to the subpoena, Ms. Gillam generally objected to the
15 requests on the basis of an unidentified privilege and work product doctrine. She did not
16 produce a privilege log. The parties did not specifically litigate any privilege issue in the
17 underlying motion because Ms. Gillam did not specifically assert or argue one. Instead,
18 she argued for work product protection. But now—for the first time—Ms. Gillam asserts
19 a “law enforcement privilege.” She argues that her communications with federal
20 regulators in her capacity as an attorney for a whistleblower are privileged and constitute
21 attorney work product.

22 After this court considered the underlying discovery motion and ordered her to
23 produce documents, Ms. Gillam asserted a “law enforcement privilege” as to her
24 communications with the Securities and Exchange Commission (SEC) and Office of
25 Comptroller of Currency (OCC). Because she never asserted this objection in the
26 underlying discovery dispute, though, the court overrules it as waived. *Richmark Corp.*
27 *v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992); *see Fed.R.Civ.Proc.*
28 *45(d)(3)(A)(iii)* (stating that privilege can be waived in response to subpoenas).

1 But even if the court were to consider this privilege, it would still overrule it.
2 According to the Ninth Circuit, “[T]he federal privilege applicable to the government
3 interest in preserving confidentiality of law enforcement records has various names,”
4 including “the official information privilege,” the “law enforcement privilege,” and
5 “executive privilege.” *Deocampo v. City of Vallejo*, 2007 U.S. Dist. LEXIS 43744, at
6 *13-14 (E.D. Cal. June 1, 2007); *Hayslett v. City of San Diego*, 2014 U.S. Dist. LEXIS
7 37738, at *5 (S.D. Cal. Mar. 21, 2014). It serves a specific purpose:

8 Although the Ninth Circuit has only mentioned the law
9 enforcement privilege in passing . . . [t]he Second Circuit has
10 explained that the law enforcement privilege is designed “to
11 prevent disclosure of law enforcement techniques and
12 procedures, to preserve the confidentiality of sources, to protect
13 witness and law enforcement personnel, to safeguard the
14 privacy of individuals involved in an investigation, and
15 otherwise to prevent interference with an investigation.”

16 *Ibrahim v. Dep't of Homeland Sec.*, 2009 U.S. Dist. LEXIS 122598 at *41 (N.D. Cal.
17 Dec. 17, 2009) (quoting *In re Department of Investigation of City of New York*, 856 F.2d
18 481, 484 (2d Cir. 1988)). “In determining what level of protection should be afforded by
19 this privilege, courts conduct a case-by-case balancing analysis, in which the interests of
20 the party seeking discovery are weighed against the interests of the *governmental entity*
21 *asserting the privilege.*” *Hayslett*, 2014 U.S. Dist. LEXIS 37738, at *5 (emphasis added).
22 But a prerequisite for invoking any law enforcement privilege is that the asserting party
23 “must make a substantial threshold showing by way of a declaration or affidavit from a
24 responsible official with personal knowledge of the matters to be attested to in the
25 affidavit.” *Perez v. United States*, 2016 U.S. Dist. LEXIS 11036, at *10-11 (S.D. Cal.
26 Jan. 29, 2016) (internal quotations and citations omitted).

27 At the threshold of this inquiry, this privilege is not available to Ms. Gillam
28 because she is not a government entity. Even if she could show a connection to one, she
does not adequately assert a law enforcement privilege because she fails to make a
“substantial threshold showing” through a personal statement by an official with

1 knowledge of the underlying issues. She also does not specifically assert the protection
2 of confidential techniques, procedures, investigations, or personnel of law enforcement.
3 Further, the documents at issue are *her* submissions to law enforcement, and not
4 documents produced by the SEC or OCC. To the extent that Ms. Gillam claims a law
5 enforcement privilege, her communications with the SEC and OCC do not fall under any
6 such privilege. Therefore, even if the court considered the objection timely, it would
7 overrule it on the merits.

8 **B. Privilege for Government Agencies.**

9 Ms. Gillam argues that her communications with the SEC and OCC are also
10 privileged because forcing her to turn them over will have a chilling effect on
11 whistleblowing. She cites to the SEC’s rules that state “the Commission . . . shall not
12 disclose any information, including information provided by a whistleblower to the
13 Commission, which could reasonably be expected to reveal the identity of a
14 whistleblower.” 5 U.S.C. § 78u-6. First, under this rule the SEC specifically provides a
15 privilege from disclosure *by the SEC*, and not by individuals. Second, when Erhart filed
16 his complaint, he revealed his identity as a whistleblower. Thus, any purported
17 protection by the SEC rules do not apply to Ms. Gillam and to her communications with
18 the SEC.

19 Next, Ms. Gillam contends that the OCC’s rules “exempt a slew of information and
20 files from public disclosure, including a record furnished in confidence or a record or
21 information compiled for law enforcement purposes.” *Jt. Mtn.*, p.19; *see* 12 C.F.R. 4.12
22 (citing OCC records exempt from disclosure under FOIA). Ms. Gillam states that after
23 she filed the whistleblower complaint, the OCC sent a letter to her stating that “any
24 supervisory correspondence in either party’s possession constitutes privileged non-public
25 OCC information, which, absent OCC authorization or a Federal court order, you are
26 prohibited by law from using in connection with the above civil actions [i.e. the
27 whistleblower action].” *See* 12 C.F.R. Part 4, Subpart C; *Jt. Mtn.*, p.19. Thus, she argues
28 that she cannot disclose any communications she had with the OCC.

1 The court finds that the cited OCC rule does not protect any communication from
2 Ms. Gillam to the OCC. The rule itself states that “[a] record contained in or related to an
3 examination, operating, or condition report prepared by, on behalf of, or for the use of the
4 OCC or any other agency responsible for regulating or supervising financial institutions”
5 is exempt from disclosure *to the public* under FOIA. 12 C.F.R. 4.12(b)(8). First, it is
6 unclear whether Ms. Gillam, a third party individual, would be protected by this statute.
7 Second, these documents do not have to be publicly disclosed and can be produced as a
8 confidential production under the protective order. [Dkt. No. 21.] Third, the OCC allows
9 “disclosure” if ordered by a Federal court.

10 Not seeing any available protection under the SEC or OCC rules for Ms. Gillam’s
11 communications, the court overrules her objections on those bases.

12 **C. Work Product Doctrine.**

13 **1. Applicability of Work Product Protection.**

14 Ms. Gillam argues that her communications with federal agencies are also
15 protected as work product. She argues that she represents Erhart in his whistleblower
16 complaint and that the select documents she turned over to federal regulators “were
17 prepared in anticipation of litigation.” *Jt. Mtn.*, p.17. BofI argues that work product
18 protection does not apply here.

19 The work product doctrine affords a qualified protection from discovery for
20 material obtained and prepared by an attorney or an attorney’s agent “in anticipation of
21 litigation.” *Hickman v. Taylor*, 329 U.S. 495 (1947). Work product immunity is meant
22 “to guard against the divulging of attorney's strategies and legal impressions, it does not
23 protect facts concerning the creation of work product or *facts contained within the work*
24 *product.*” *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Cal. 2003) (emphasis in
25 original) (citations omitted).

26 BofI argues that work product immunity does not apply here because Ms. Gillam is
27 not a lawyer for a federal law enforcement agency and she provided the documents while
28 Erhart was still employed (i.e. before his wrongful termination claim arose). Therefore,

1 BofI argues, they were not prepared in anticipation of his whistleblower complaint
2 against BofI and they were provided to third parties. Ms. Gillam maintains the
3 communications contain her legal strategies and impressions—i.e. her work product—
4 which is enough to protect them from discovery by BofI. She apparently made these
5 work product claims in her privilege log (albeit late). BofI does not contest any particular
6 claim of work product immunity in the privilege log; they only contest the applicability
7 of work product immunity as to these communications.

8 By sending these communications to law enforcement agencies, Ms. Gillam did
9 not waive work product protection: “[A]ttorney work-product protection is not
10 automatically waived upon disclosure to third parties... because ‘the purpose of the
11 work-product rule is ... to protect it only from the knowledge of opposing counsel and
12 his client.’” *California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.*, 299
13 F.R.D. 638, 645 (E.D. Cal. 2014) (citation omitted). Further, “[d]isclosure to [a] person
14 with interest common to that of attorney or client is not inconsistent with intent to invoke
15 work product doctrine's protection and would not amount to waiver.” *Id.* (citing *In re*
16 *Doe*, 662 F.2d 1073, 1081 (4th Cir.1981)). In the context of work product, common
17 interest is more broadly construed to include disclosure to third parties. *Id.* (citing *U.S. v.*
18 *Am. Tel. and Tel. Co.*, 642 F.2d 1285, 1298–99 (D.C.Cir.1980) (finding no waiver
19 because “the disclosure had occurred under a statutory guarantee of confidentiality on the
20 part of the government”)).

21 Here, Ms. Gillam shared a common interest with the federal regulators to uncover
22 any alleged wrongdoing by BofI. Further, the SEC and OCC regulations provide for
23 confidentiality. While those regulations, on their own, may not be enough to protect the
24 communications from disclosure by Ms. Gillam to BofI in this case, they do show that
25 the agencies will not publicly disclose Ms. Gillam’s work product. Therefore, Ms.
26 Gillam’s communications with law enforcement agencies—with whom she shared a
27 common interest—did not waive her work product claim.

28 ///

2. Overcoming a Work Product Claim.

To overcome the work product claim BofI must show “that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A)(ii); *Bozzuto v. Cox*, 255 F.R.D. 673, 678 (C.D. Cal. 2009). BofI does not demonstrate a substantial need at this point because it simply argues the documents are relevant. BofI asserts that the fact that Ms. Gillam has the documents will show that Erhart stole them from BofI, which goes to the heart of this suit. Jt. Mtn., p.14. Ms. Gillam argues the documents are protected because they were prepared in anticipation of litigation, and further, BofI cannot show substantial need for them because they are not relevant to this lawsuit. For example, Erhart points out that in BofI’s June 10, 2016 motion for summary adjudication as to Erhart’s whistleblower defenses in this action, BofI admits these communications to law enforcement are not relevant because its sole concern in this action is Erhart’s *public dissemination* of BofI’s confidential information: “It is irrelevant whether or not Erhart also reported to regulators, government officials or other authorized individuals concerning his allegations of wrongdoing by BofI.” Mem. Ps&As, pp.1-2, Dkt. No. 45 (emphasis in original).

At this point in the litigation, with motions pending for preliminary injunction and summary adjudication, it is premature to determine whether the relevance of Ms. Gillam’s law enforcement communications is compelling enough to show BofI’s substantial need for those documents. Further, under the stipulated Temporary Restraining Order, Erhart agreed to deliver to BofI’s counsel “all BofI records and documents and any Confidential Information in any form” in Erhart’s possession. Dkt. No. 10, p.2. In a stipulated Supplemental TRO, Erhart agreed to “Provide a list of all materials he removed from BofI ... (referred to as the “Inventory”)” and “Provide a list of all individuals to whom Erhart or his agents, including counsel, has disclosed each item on the Inventory.” Dkt. No. 17, p.2. Erhart also agreed to sign a declaration confirming that the Inventory and list of individuals are accurate and exhaustive. *Id.*

1 Given the uncertainties as to relevance and the apparent availability of these
2 documents from other sources, BofI has not demonstrated a compelling need at this time
3 for Ms. Gillam’s law enforcement communications. The court therefore sustains Ms.
4 Gillam’s work product objections. If these communications, though, take on more
5 relevance as the case progresses and are not available by any other less intrusive means,
6 BofI may contest the applicability of work product as to any specific document identified
7 in the privilege log.

8 **D. Whether Ms. Gillam is in Contempt of April 26 Order.**

9 BofI argues that Ms. Gillam cannot show she took reasonable steps to comply with
10 the court’s order or that compliance was impossible. It asks this court to hold her in
11 contempt and order her to immediately and fully comply with the April 26 Order. Ms.
12 Gillam, though, argues that she did not read the court’s order as requiring her to turn over
13 her communications with federal regulators and law enforcement since the order focused
14 on communications with the media. She claims that through this motion BofI seeks “to
15 vastly expand the scope of the order” because Erhart’s whistleblowing activities—in the
16 words of BofI itself—are not relevant to this lawsuit. Jt. Mtn., p.16.

17 While the subpoena sought communications regarding BofI with any person during
18 the time period September 23, 2013 to the present, the subject of the discovery dispute
19 concerned communications with the media, and not with federal agencies. BofI also
20 admits that its main concern in this lawsuit is the public dissemination of its confidential
21 information, and not disclosure to law enforcement agencies. Finally, while Ms. Gillam’s
22 production of documents and a privilege log may have been delayed, this court does not
23 find that Ms. Gillam “failed without adequate excuse to obey the subpoena or an order
24 related to it.” Fed. R. Civ. P. 45(g). Therefore, the court denies the motion for contempt.

25 **IV. REQUEST FOR JUDICIAL NOTICE**

26 Ms. Gillam requests judicial notice for documents in support of this discovery
27 motion. Federal Rule of Evidence 201 allows a court to take judicial notice of a fact “not
28 subject to reasonable dispute in that it is either (1) generally known within the territorial

1 jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort
2 to sources whose accuracy cannot be reasonably questioned.” Fed. R. Evid. 201(b).
3 Additionally, a “court shall take judicial notice if requested by a party and supplied with
4 the necessary information.” Fed R. Evid. 201(c). Judicial notice, however, is
5 inappropriate where the facts to be noticed are irrelevant. *Ruiz v. City of Santa Maria*,
6 160 F.3d 543, 548 n.13 (9th Cir. 1998); *Turnacliff v. Westly*, 546 F.3d 1113, 1120 n.4
7 (9th Cir. 2008).

8 Ms. Gillam seeks to judicially notice these documents.

9 **A. Website Article.**

- 10 1. Exhibit G, a news article by Aurelius³ titled, “Recent BofI Filing
11 Confirms Existence of Undisclosed Subpoenas and Nonpublic
12 Government Investigations” (November 5, 2015), posted on Seeking
13 Alpha. The author discloses, “Note: The author has no relationship of
14 any kind with Mr. Erhart or his lawyers. This article is based entirely on
15 publicly available documents. The court documents are publicly available
16 on the federal PACER system. The case number is 3:15-cv-02353-BAS-
17 NLS, BofI Federal Bank v. Erhart et al.” This article is available at
[http://seekingalpha.com/article/3652296-recent-bofi-court-filing-
confirms-existence-undisclosed-subpoenas-nonpublic-government](http://seekingalpha.com/article/3652296-recent-bofi-court-filing-confirms-existence-undisclosed-subpoenas-nonpublic-government) (last
visited July 27, 2016).

18 As to the existence of this internet posting, the article is readily verifiable by
19 reference to the listed web address, and thus the court takes judicial notice of its
20 existence. But the court does not judicially notice any of the facts cited in it. *Signature*
21 *Management Team, LLC v. Automattic, Inc.*, 941 F.Supp.2d 1145, 1147-48 (N.D. Cal.
22 2013) (taking judicial notice of the existence of blog postings but not of the facts recited
23 in them).

24 ///

25 ///

26 _____

27 ³ Aurelius is an anonymous internet user who writes online articles using CenturyLink as
28 the internet service provider.

1 **B. Filings in Other Cases.**

- 2
- 3 1. Exhibit H, Court Order denying BoffI's motion to compel and granting
- 4 Seeking Alpha's crossmotion to quash the subpoena., U.S.D.C. Southern
- 5 District of New York, Case No.:1:16-mc-00025-P1.
- 6 2. Exhibit I, Aurelius' motion to quash subpoena issued to CenturyLink
- 7 Communications, LLC, U.S.D.C. Central District of California Case No.:
- 8 2:16-cv-71.

9 A court may take judicial notice of records in another proceeding but not the "facts

10 essential . . . [to the case] before it." *M/V American Queen v. San Diego Marine Constr.*

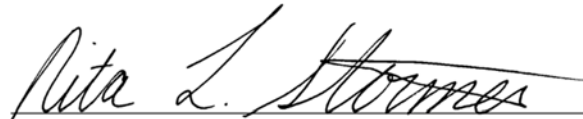
11 *Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) (alteration in original) (citation omitted).

12 Accordingly, the request for judicial notice of Exhibits H and I is granted as to their

13 existence, without regard their truth or any findings of fact.

14 **IT IS SO ORDERED.**

15 Dated: August 5, 2016

16 

17 Hon. Nita L. Stormes
18 United States Magistrate Judge

19

20

21

22

23

24

25

26

27

28